

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

PAUL E. MUSKETT and JAMES A.
MUSKETT,

Plaintiffs,

v.

CERTEGY CHECK SERVICES, INC.,

Defendant.

HONORABLE JEROME B. SIMANDLE

Civil No. 08-3975 (JBS/JS)

OPINION

APPEARANCES:

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SIMANDLE, District Judge:

This case arises out of several instances in which Defendant Certegy Check Services declined to authorize checks offered by Plaintiffs Paul and James Muskett as payment for goods at Home Depot and Staples stores. Plaintiffs have alleged defamation as well as violations for the New Jersey Consumer Fraud Act ("NJCFA"), the Fair Credit Reporting Act ("FCRA") and the Fair Credit Billing Act ("FCBA").¹ The action is presently before the Court on Defendant's unopposed motion for summary judgment [Docket Item 23]. The Court will grant Defendant's unopposed motion for the reasons expressed below.

I. BACKGROUND

A. Facts

Certegy provides check authorization and warranty services to merchants. (Def. Statement of Material Facts ¶ 6.)² From

¹ On April 5, 2009, Plaintiffs consented to dismissal of their FCBA cause of action and accordingly this Court will grant Defendant summary judgment on this claim [Docket Item 12 at 29].

² Plaintiffs do not contest any of Defendant's statement of material facts not in dispute and so, pursuant to Local Civil Rule 56.1(a), those facts are deemed undisputed for the purposes of this summary judgment motion. See, e.g., Glazewski v. Corzine, No. 06-4107, 2009 WL 5220168, at *1 (D.N.J. Dec. 31, 2009) (where pro se plaintiff failed to respond to defendant's statement of material facts not in dispute, those facts are deemed undisputed under Local Civil Rule 56.1(a)); Bernard v. Stanfield, No. 07-3394, 2009 WL 5205272, at *1-2 (D.N.J. Dec. 22, 2009) (same); Handron v. Sebelius, 669 F. Supp. 2d 490, 492 (D.N.J. 2009) (failure to respond to movant's statement of material facts not in dispute results in those facts being deemed undisputed pursuant to Rule 56.1(a)).

2006 through 2007, Home Depot and Staples had agreements with Certegy whereby Certegy agreed to perform a series of risk management and fraud detection processes before authorizing a check offered as payment at a Home Depot or Staples retail store. (Id. ¶¶ 9, 11.) In addition, Staples elected to have warranty coverage, so that Certegy would pay the amount of any authorized check that was returned for insufficient funds. (Id. ¶ 10.) The formula for calculating the risk of any particular check includes specifications from the merchants. (Id. ¶ 11.) A non-warranty merchant may determine whether the amount of the check or the number of checks issued by the check-writer should be considered in the calculation. (Id.) To initiate the authorization process, the merchant enters the location number, the amount of the check, the routing and account number, and sometimes the checkwriter's government-issued identification card into a computer system. (Id.) If Certegy declines to authorize a check it will generally, but not always, provide a decline code to the merchant with a reason for the declination. (Id. ¶ 13.) A merchant is free to accept a check that has not been authorized, but will not benefit from Certegy's warranty. (Id. ¶ 15.)

Plaintiffs are attorneys who practice together in the firm Muskett & Muskett. (Id. ¶ 5.) Four times in January 2006, Paul Muskett attempted to purchase items at the Home Depot in Egg Harbor Township, New Jersey using checks. (Id. ¶¶ 19-42.) On

two of those occasions, the Home Depot cashier told Paul Muskett that Certegy had declined to authorize his check, but after a phone call to Certegy his checks were accepted. (Id. ¶¶ 23, 28-32.) On one occasion, Home Depot immediately accepted his check. (Id. ¶ 33.) On the last occasion Certegy decline to authorize the check, the cashier did not give Paul Muskett a reason for declining the check, and Mr. Muskett left the store without completing his purchase. (Id. ¶¶ 34-37.)

On July 23, 2007, Paul Muskett attempted to make another purchase with a check, this time at Staples in Somers Point, New Jersey. (Id. ¶ 43.) Staples provided the check information to Certegy electronically and received this response:

Thank you, STAPLES 439. Although we show no negative information on file, we must decline to authorize this transaction, based on certain established limits which may include recently authorized checks on this identification. Please remember when declining checks to give your customer a "Consumer Turndown" card which tells the consumer how to contact Certegy Check Services for further information. We ask that you use tact and discretion at this time to ensure your customer's privacy.

(Id. ¶ 50.) Kevin Hoyt, the store manager, told Paul Muskett that the store would not accept the check, but did not provide a reason. (Id. ¶¶ 44-45.) James Muskett tried to make a purchase with a different check, but Staples received the same response from Certegy. (Id. ¶¶ 47, 50.) When Mr. Hoyt told Plaintiffs that the store would not accept this second check, Plaintiffs left the store without completing a purchase. (Id. ¶ 49.)

On August 2, 2007, both Paul and James Muskett wrote letters to Certegy requesting "a free copy of my file at Certegy." (Def. Exh. G.) In response Certegy provided both men with a consumer report file disclosure. (Def. Exhs. H & I.) With regards to the check declined on July 23, 2007, Certegy explained: "This transaction fell outside of the guidelines Certegy has established for authorization." (Id.)

Plaintiffs have not suffered any economic loss as a result of the declinations of their checks. (Def. Statement of Material Facts ¶ 56.) The only alleged injury suffered by Plaintiffs is embarrassment. (Id. ¶¶ 58-59.)

B. Procedural History

On July 9, 2008, Plaintiffs brought suit in the Superior Court of New Jersey and Defendant subsequently removed the action to this Court, asserting jurisdiction pursuant to 28 U.S.C. § 1331. In March 2009, Defendant filed a motion for summary judgment [Docket Item 9], which Plaintiffs opposed [Docket Items 12], but Defendant subsequently withdrew that motion without prejudice [Docket Item 21]. In their opposition to the March 2009 motion for summary judgment, Plaintiffs consented to dismissal of their Fair Credit Billing Act claim. (Pls. Apr. 5, 2009 Opp'n at 29.) After completing discovery, Defendant submitted the instant motion for summary judgment and Plaintiffs have not opposed.

II. DISCUSSION

A. Standard of Review

Summary judgment is appropriate when the materials of record "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). A dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" only if it might affect the outcome of the suit under the applicable rule of law. Id. Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment. Id.

"[T]he nonmoving party may not, in the face of a showing of a lack of a genuine issue, withstand summary judgment by resting on mere allegations or denials in the pleadings; rather, that party must set forth 'specific facts showing that there is a genuine issue for trial,' else summary judgment, 'if appropriate,' will be entered." U.S. v. Premises Known as 717 S. Woodward Street, Allentown, Pa., 2 F.3d 529, 533 (3d Cir. 1993) (quoting Fed. R. Civ. P. 56(e)) (citations omitted).

Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of

proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 323.

In the present case, Plaintiffs' failure to respond "is not alone a sufficient basis for the entry of a summary judgment." See Anchorage Assocs. v. Virgin Islands Bd. of Tax Review, 922 F.2d 168, 175 (3d Cir. 1990) (holding that a local rule deeming unopposed motions to be conceded did not justify the grant of summary judgment without analysis under Rule 56(e), Fed. R. Civ. P.). The Court must still determine, even for an unopposed summary judgment motion, whether the motion for summary judgment has been properly made and supported and whether granting summary judgment is "appropriate," as required by Rule 56(e), Fed. R. Civ. P. In order to grant Defendant's unopposed motion for summary judgment, where, as here, "the moving party does not have the burden of proof on the relevant issues, . . . the [Court] must determine that the deficiencies in [Plaintiff's] evidence designated in or in connection with the motion entitle the [Defendants] to judgment as a matter of law." Id. Additionally, pursuant to Local Civil Rule 56.1(a), Defendant's statement of material facts not in dispute, as to which Plaintiffs have filed no objection and counter statement, are deemed undisputed for the purposes of this summary judgment motion.

B. January 2006 Claims and Statute of Limitations

As an initial matter, Defendant argues that Plaintiffs' defamation and Fair Credit Reporting Act claims arising from the January 2006 incidents are barred by the relevant statutes of limitations.³ The Court agrees that Plaintiffs' defamation claims arising from January 2006 are untimely, but will decline to grant summary judgment as to Plaintiffs' FCRA claims based on the statute of limitations.

Plaintiffs' defamation claims are subject to a one-year limitations period. N.J. Stat. Ann. § 2A:14-3.1 ("Every action at law for libel or slander shall be commenced within 1 year next after the publication of the alleged libel or slander."). Plaintiff brought suit on July 9, 2009, more than one year after the allegedly defamatory statements were made to the Home Depot cashiers declining check authorization. As a consequence, Plaintiffs' defamation claims are untimely.

The FCRA, however, has a two-year statute of limitation from "the date of discovery by the plaintiff of the violation that is the basis for such liability." 15 U.S.C. § 1681p. While Plaintiffs may have discovered the falsity of the information

³ Plaintiffs' NJCFA claims are subject to the six-year statute of limitations in N.J. Stat. Ann. § 2A:14-1 and are therefore timely. Trinity Church v. Lawson-Bell, 925 A.2d 720, 727 (N.J. Super. Ct. App. Div. 2007); DiIorio v. Structural Stone & Brick Co., Inc., 845 A.2d 658, 663 (N.J. Super. Ct. App. Div. 2004).

passed on to Home Depot regarding authorization in January 2006, their claims regarding insufficient disclosure of the reasons for the declination accrued on August 17, 2007, when Certegy provided them with their disclosures. Only then did Plaintiffs discover the alleged disclosure violation. As a consequence, Plaintiffs' FCRA claims arising from January 2006 are timely.

B. Defamation

Defendant argues, among other things, that Plaintiffs cannot establish a defamation cause of action based on the July 23, 2007 incident at Staples because the statement made electronically by Certegy to Staples was not defamatory. For the reasons to be expressed, the Court will grant Defendant summary judgment on Plaintiffs' defamation claims.

The elements of a defamation claim under New Jersey law are: "(1) the assertion of a false and defamatory statement concerning another; (2) the unprivileged publication of that statement to a third party; and (3) fault amounting at least to negligence by the publisher." Leang v. Jersey City Bd. of Educ., 969 A.2d 1097, 1113 (N.J. 2009); DeAngelis v. Hill, 847 A.2d 1261, 1267-68 (N.J. 2004). Whether a statement is defamatory is a question of law to be decided by the Court. DeAngelis, 847 A.2d at 1268. To make that determination the Court must consider (1) the content, (2) the verifiability, and (3) the context of the challenged statement. Leang, 969 A.2d at 1113 (citing DeAngelis, 847 A.2d

at 1268). "In general, words that subject a person to ridicule or contempt, or that clearly sound to the disreputation of an individual are defamatory on their face." Id.

The challenged statement at issue reads in its entirety:

Thank you, STAPLES 439. Although we show no negative information on file, we must decline to authorize this transaction, based on certain established limits which may include recently authorized checks on this identification. Please remember when declining checks to give your customer a "Consumer Turndown" card which tells the consumer how to contact Certegy Check Services for further information. We ask that you use tact and discretion at this time to ensure your customer's privacy.

(Id. ¶ 50.) Taking into consideration its content, the context, and the factual nature of this statement, the Court concludes that no reasonable person of ordinary intelligence could find such statement to be defamatory. See DeAngelis, 847 A.2d at 1268 ("The content analysis requires courts to consider the fair and natural meaning that will be given to the statement by reasonable persons of ordinary intelligence.") (internal citations and punctuation omitted). Given the wide range of innocuous explanations for such a refusal, such as a limit on the number of checks any given customer can use a payment or a limit in the amount of those checks, and the express acknowledgment that there was "no negative information on file," the Court finds that this statement could not be injurious to Plaintiffs (beyond the inconvenience of being unable to use a check as a form of payment). Nothing in this statement could subject a person to

ridicule or contempt, nor does it undermine the reputations (professional or otherwise) of either Plaintiff. (It is also inconceivable to this Court how two attorneys, Plaintiffs herein, could believe such a statement to be defamatory under the long-established requirements of New Jersey law.) The Court concludes that Plaintiffs have failed to offer evidence from which a reasonable fact-finder could find that Defendant made a defamatory statement about them. Defendant is consequently entitled to summary judgment on this claim.

C. New Jersey Consumer Fraud Act

Defendant asks the Court to grant summary judgment on Plaintiff's New Jersey Consumer Fraud Act claim, arguing that the NJCFA does not apply to the circumstances of this case and further that Plaintiffs have not offered any evidence of ascertainable loss. Defendant is correct that a central element to a NJCFA claim is ascertainable loss. Bosland v. Warnock Dodge, Inc., 964 A.2d 741, 749 (N.J. 2009) (finding the elements of a NJCFA claim to be "1) unlawful conduct by defendant, 2) an ascertainable loss by plaintiff, and 3) a causal relationship between the unlawful conduct and the ascertainable loss"). Such a loss must be of "moneys or property, real or personal." N.J. Stat. Ann. § 56:8-19; Lee v. First Union Nat'l Bank, 971 A.2d 1054, 1058 (N.J. 2009). In this case, it is undisputed that Plaintiffs did not suffer any loss of moneys or property. (Def.

Statement of Material Facts ¶ 56.)⁴ In the absence of any evidence of an ascertainable loss, Defendant is entitled to summary judgment on Plaintiffs' NJCFA claim.⁵

D. Fair Credit Reporting Act

Finally, Defendant seeks summary judgment on Plaintiffs' claims under the Fair Credit Reporting Act, though it acknowledges that Certegy is a "credit reporting agency" to whom the FCRA requirements apply. At best guess, it appears that Plaintiffs claimed in their Complaint that Defendant submitted an inaccurate report in violation of 15 U.S.C. § 1681e(b) and that Defendant failed to provide proper disclosures under 15 U.S.C. § 1681g regarding the decision to decline authorization.⁶ The

⁴ As with Plaintiffs' faulty defamation claim above, Plaintiffs have filed a baseless claim under the New Jersey Consumer Fraud Act. The requirement that a consumer suffer an ascertainable loss in money or property is so well-established under NJCFA jurisprudence that it is difficult to understand how two licensed attorney-plaintiffs could have disregarded it in signing and filing their Complaint.

⁵ The Court has found no evidence of an ascertainable loss and will not address Defendant's argument regarding the applicability of the NJCFA.

⁶ In analyzing Plaintiffs' FCRA claims that Court is left at a significant disadvantage, because Plaintiffs' complaint fails to identify which of the thirty provisions of the FCRA have been violated and Plaintiffs have not responded to Defendant's motion for summary judgment. Although Plaintiffs' Fifth Count mentions the Fair Credit Reporting Act, the Complaint does not cite the Act or any of its subdivisions. The Court is left to wonder whether these Plaintiffs actually consulted the FCRA and its statutory provisions before (or after) filing suit. Nonetheless, Plaintiffs being a non-moving party (despite their failure to oppose) the Court has done its best to identify the provisions on

Court finds that Plaintiffs have failed to submit evidence to support either claim and will grant summary judgment in favor of Defendant for the reasons explained below.

Section 1681e(b) states: "Accuracy of report. Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." The elements required to prove a violation of this provision are: "(1) inaccurate information was included in a consumer's credit report; (2) the inaccuracy was due to defendant's failure to follow reasonable procedures to assure maximum possible accuracy; (3) the consumer suffered injury; and (4) the consumer's injury was caused by the inclusion of the inaccurate entry." Philbin v. Trans Union Corp., 101 F.3d 957, 963 (3d Cir. 1996).

Plaintiffs have not offered evidence from which a reasonable fact-finder could find that Certegy's report to Staples included inaccurate information or that this inaccuracy was due to Certegy's failure to follow reasonable procedures. It is not enough for Plaintiffs to show that they had sufficient funds in their bank accounts to cover the offered check. Certegy does not have access to Plaintiffs' accounts, but is rather in the business of calculating risk based on a formula. Plaintiffs have

which Plaintiffs might rely.

offered no evidence that the proposed check transaction did not fall "outside of the guidelines Certegy had established for authorization." Moreover, Plaintiffs have not offered any evidence whatsoever regarding the procedures used by Certegy, reasonable or otherwise. Given the absence of evidence the Court will grant Defendant summary judgment on any claim under Section 1681e(b) of the FCRA.

"Section 1681g requires consumer reporting agencies to disclose to a consumer, upon request, the nature, substance, and sources of information in their files that pertain to the consumer, 15 U.S.C. § 1681g(a)(1) and (2)." Houghton v. New Jersey Mfrs. Ins. Co., 795 F.2d 1144, 1147 n.4 (3d Cir. 1986). Expressly excluded from this disclosure requirement, however, is "any information concerning credit scores or any other risk scores or predictors relating to the consumer." 15 U.S.C. § 1681g(a)(1)(B). Moreover, "In the 2003 FACT Act amendments to the FCRA, Congress added an exemption for check services companies from certain requirements to provide consumers with access to credit scoring information." Holmes v. TeleCheck Int'l, Inc., 556 F. Supp. 2d 819, 839 (M.D. Tenn. 2008) (citing 15 U.S.C. § 1681c(d)(2)⁷). Therefore, Plaintiffs cannot bring a

⁷ Section 1681c(d)(2) reads:

Key factor in credit score information. Any consumer reporting agency that furnishes a consumer report that contains any credit score or any other risk score or

claim against Certegy for failing to more fully explain how the proposed transactions fell outside the guidelines for authorization. See 15 U.S.C. § 1681g(a)(1)(B); Holmes, 556 F. Supp. 2d at 839 (finding as a matter of law that plaintiff cannot state a claim against a check services company for failure to identify the variables used to identify the level of risk in authenticating plaintiff's check). If any other FCRA provision is applicable, it is not apparent to the Court nor have Plaintiffs invoked any in the many months since filing their Complaint. The Court will grant summary judgment to Defendant on Plaintiffs' FCRA claim.

III. CONCLUSION

As explained above, it is apparent that Plaintiffs Paul E. Muskett and James A. Muskett, members of the New Jersey Bar, did not bring the same level of care and professionalism to the filing of multiple baseless claims in this case as they might have in representing a client. For reasons best known to

predictor on any consumer shall include in the report a clear and conspicuous statement that a key factor (as defined in section 609(f)(2)(B) [15 USCS § 1681g(f)(2)(B)]) that adversely affected such score or predictor was the number of enquiries, if such a predictor was in fact a key factor that adversely affected such score. This paragraph shall not apply to a check services company, acting as such, which issues authorizations for the purpose of approving or processing negotiable instruments, electronic fund transfers, or similar methods of payments, but only to the extent that such company is engaged in such activities.

Plaintiffs, they launched litigation seeking relief that was untethered to the established requirements of New Jersey law of defamation and of the Consumer Fraud Act, as well as ignorant of the mandates of federal law under the Fair Credit Reporting Act. This misdirected effort consumed the Defendant's resources and the Court's time over the 22-month course of this case, without apparent justification in the record. Such tactics look more like a personal vendetta against Defendant than normal litigation filed in good faith. For the foregoing reasons, Defendant's unopposed motion for summary judgment shall be granted and the Complaint shall be dismissed with prejudice. The accompanying Order will be entered. Costs will be taxed in favor of Defendant Certegy Check Services, Inc.

July 6, 2010
Date

Jerome B. Simandle
JEROME B. SIMANDLE
U.S. District Judge